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No. 362

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

[illegible], Jr., et al., *Appellants*

v.

VIOLA A. [illegible], et al., *Appellees*

Appeal From the [illegible] District Court
For the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit
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CLERK

Abram J. Rutzen
Paul M. Wright
Thomas J. Kenyon
[illegible] Building
Washington 5, D. C.
Attorneys for Appellants

Press of Byron S. Adams, Washington, D. C.

QUESTIONS PRESENTED

1. D. C. Code Section 21-311 requires that a petition for a Writ De Lunatico Inquirendo be accompanied by the affidavits of two responsible residents of the District of Columbia. Appellee Hodson accompanied her verified petition in her lunacy proceeding against Mrs. Dorothy Smallwood Geare with the affidavits of Drs. Campbell and Cohen. The doctors' affidavits were procured and filed by Appellee Hodson with her petition. In the joint trial of cases involving, among other issues, an issue of Mrs. Geare's mental capacity to make a deed and will in favor of Appellee Hodson, appellants proffered the doctors' affidavits and her petition as "admissions against interest." The District Court received her petition in evidence but excluded the doctors' affidavits from the evidence. The question is: Were the doctors' affidavits admissible in evidence as admissions by reference and/or adoption?

2. The trial court excluded, as not admissible under the Federal Shopbook Rule, a part of the record of Saint Elizabeths Hospital which was a factual statement of the history of the patient, Dorothy S. Geare, which statement was given by Appellee Hodson and recorded by a member of the hospital staff at the hospital, within a few days after the admission of the patient, and soon after the execution of the will and deed in question, in the regular course of the business of the hospital, for use by the hospital staff. The record contained admissions by Appellee Hodson which were inconsistent with her position in these cases. The record was material to: (1) the issue of mental capacity, (2) the issue of undue influence, duress and coercion, (3) the issue of fraud and deceit, and (4) the credibility of the Appellee Hodson. The question presented is: Was this part of the hospital record admissible under the Federal Shopbook Rule?

3. Did the trial court err in giving on repeated occasions during their deliberations and after the jury had reported that it appeared to be a "hung" jury, supplemental instructions to the jury which included parts of the language from approved charges, but which parts were employed repeatedly and in a manner which coerced the minority of the jury into changing their position and joining in a verdict within three minutes after the Court told them that they were the jury which had to decide the case? Did the court err in refusing to instruct the jury also that no individual juror need give up his own convictions?

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., *Appellants*

v.

VIOLA A. HODSON, ET AL., *Appellees*

Appeal From the United States District Court For the District of Columbia

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT.

Case No. 13,201 is an appeal from a judgment based on findings of fact and conclusions of law of the District Court sustaining a deed. The District Court had jurisdiction under Section 11-306 of the District of Columbia Code, 1951 Edition.

Case No. 13,202 is an appeal from a judgment admitting a will to probate and granting letters testamentary,

after a verdict sustaining the will. The District Court had jurisdiction under Sections 11-503 and 19-312 of the District of Columbia Code, 1951 Edition.

This Court has jurisdiction of both appeals under Section 1291, Title 28, of the United States Code Annotated.

STATEMENT OF CASES

Case No. 13,201 arises out of an action, in the nature of an equity proceeding, to set aside a deed from Dorothy Smallwood Geare, deceased, to the Appellee Hodson.

Case No. 13,202 arises out of a contest of a will purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

Parties

Appellants are the nephew and nieces and the only heirs at law and next of kin of Dorothy Smallwood Geare, deceased, who died on December 28, 1954. In the District Court, they were the plaintiffs in the action to set aside the deed and in the will contest.

Appellee Hodson is the sole grantee in the deed dated February 2, 1954, and recorded April 14, 1954, whereby the Decedent Geare conveyed to her without any consideration a valuable piece of real estate in the District of Columbia, improved by a house, which was furnished and bringing in rent of $156 per month. She was the sole defendant named in the appellants' complaint to set aside the deed. Appellee Hodson is also the executrix and principal beneficiary of a paper writing dated February 2, 1954, purporting to be the last will and testament of Dorothy Smallwood Geare, deceased, and is the defendant in the will contest.

Appellee Studt is the grantee in a deed from the Appellee Hodson, *which was recorded after the filing of the action involved in Appeal No. 13,201*, whereby the Ap-

pellee Hodson conveyed to the Appellee Studt an undivided one-half interest in the real estate conveyed by the Decedent Geare to the Appellee Hodson. She was granted leave to intervene as a defendant in the appellants' action to set aside the deed from the Decedant Geare to the Appellee Hodson. Appellee Studt is also a beneficiary of the paper writing purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

The Issues

The points on which the appellants rely on these appeals relate to the issues of the mental capacity of Dorothy Smallwood Geare to make the deed and will involved, and whether the deed and will were obtained, or the execution of them, procured from her by the fraud, deceit, undue influence, duress or coercion of the Appellee Hodson, and whether the Decedent Geare revoked the will.

The Record

In each case in the District Court, appellants filed a statement of the points on which they rely and designated for inclusion in the records on these appeals only those portions of the proceedings and evidence at the trial which relate to the points on which they rely, as required by Rule 75(d) and (e) of the Federal Rules of Civil Procedure. (App. 10 and 19-47)

The District Court ordered these cases consolidated for a joint trial. (App. 6 and 14) The cases were tried jointly. The action to set aside the deed (Appeal No. 13,201) was tried by the court without a jury and simultaneously the will case (Appeal No. 13,202) was tried before the court and a jury. As a result, the two points on which the appellants rely in Appeal No. 13,201 are the same as the first two of the three points on which the appellants rely in Appeal No. 13,202 and, in relation to these two points, the facts are the same in both cases. (App. 10 and 19)

Facts Relating to Point No. 1 that the District Court Erred in Excluding from the Evidence the Affidavits of Doctors Campbell and Cohen Filed in Mental Health Case No. 600-54 (Plaintiffs' Exhibit No. 1).

Appellants' counsel called Appellee Hodson as an adverse witness. Her testimony disclosed that on April 30, 1954, less than three months after the date of the deed and will involved, she filed her verified petition in the District Court for a Writ De Lunatico Inquirendo to require Dorothy Smallwood Geare to show cause why she should not be adjudged to be a person of unsound mind, and, among other things, alleged:

> "4. Respondent does not have any property, real or personal, other than her immediate personal effects and clothing. Her only income is the sum of $57.00 monthly from the Civil Service Retirement Fund.
>
> "5. Petitioner states that the mental condition of respondent has progressively worsened since her retirement from United States Government Service in July, 1953. She is unable to care for her person. She is confused and imagines that she is in San Francisco. Petitioner believes that respondent is incapable of managing her own affairs and is not fit to be at large or to go unrestrained and, if permitted to remain at large, the rights of persons and property will be jeopardized and, further, that respondent is a fit subject for treatment because of her mental condition." (App. 24)

Appellants offered the petition in evidence and it was received as Plaintiffs' Exhibit No. 1. (App. 21, 23-24)

As required by statute, (D.C. Code Section 21-311) Appellee Hodson accompanied her aforementioned petition by the affidavits of two responsible residents of the District of Columbia; namely, Doctors Campbell and Cohen. (App. 26-27)

Counsel for appellants began to prove the affidavits of Doctors Campbell and Cohen, and, when he had proved it, offered the affidavit of Dr. Campbell "as an admission

against interest." Counsel for appellees objected and the court said: "Objection sustained. It is not an admission of this witness.". After further questioning of the witness by counsel for appellants, the court said: "I am not going to admit an affidavit attached to a petition, executed by a third party, as an admission against interest by the petitioner." (App. 22-23)

The futility of proceeding further with the proof of the affidavit of Dr. Cohen, which, like the affidavit of Dr. Campbell, was attached to and was filed with the petition of the Appellee Hodson for the Writ De Lunatico Inquirendo, having become apparent as a result of the court's ruling on the proffer of the affidavit of Dr. Campbell, a formal proffer of the affidavit of Dr. Cohen became unnecessary and was not made.

The affidavit of Dr. Campbell appears on page 26 and the affidavit of Dr. Cohen on page 27 of the Appendix. As will be observed from a reading of their affidavits, the doctors related substantial facts showing the mental incapacity of Dorothy Smallwood Geare and expressed their opinions that she was of unsound mind. The affidavit of Dr. Campbell showed that he had Mrs. Geare under his care and treatment since her retirement from Government employment, which the petition of Appellee Hodson showed was in July, 1953, and which his affidavit made on April 30, 1954, showed was "last year." He stated "that he has observed Mrs. Geare for some months and found that her mental condition has progressively worsened" and "that her mental condition has deteriorated markedly since her retirement from Government employment last year, . . ." (App. 26).

Facts Relating to Point No. 2 that the District Court erred in Excluding from the Evidence the Records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

Appellee Hodson's testimony showed that when Dorothy Smallwood Geare was transferred to Saint Eliza-

beths Hospital, an official at the hospital asked her to inform the hospital of the history in Mrs. Geare's case, and she spoke to one person at the hospital. Counsel for appellants offered in evidence that portion of the hospital's records showing the history of Mrs. Geare furnished on that occasion by Appellee Hodson. The hospital records had been identified by a hospital employee. (App. 28-31, 34-35)

Counsel for appellants stated to the Court: "* * * All I want to offer from those records are the factual matters which would be admissible under the decision in Taylor versus New York Life Insurance." (App. 35)

The proffer of the specified portion of the hospital records, the objection thereto and the District Court's ruling appear in the Appendix on pages 28 to 31 and on page 35. The portion of the hospital records that was proffered appears in the Appendix on pages 32 to 34. (Plaintiffs' Exhibit No. 14)

The proffered history of Mrs. Geare's "Present Illness," furnished the hospital by Appellee Hodson, showed that Mrs. Geare's illness began in January, 1953, which was more than a year before she executed the deed and will; that in the summer of 1953, she became too exhausted to go to work; that her appetite had been poor all of 1953; that she needed more sleep than usual but during the winter of 1953, she was unable to sleep at night; that during the early months of 1954, she "seemed to be going more and more into a stupor," that she had several heart attacks during March and April after the stuperous condition had begun; that during March "she did not recognize her old home that she lived in for quite a while;" that she would greet people who were not there; that when she went to Emergency Hospital on February 18, Appellee Hodson heard her say, "My stomach says, 'what do you know about that?'" That she thought "that she was in San Francisco;" that at Emergency Hospital

"she got out of bed and began to pull the clothes of other patients. It was then that they asked that she be removed from the hospital. Hence, on the 30th, she was brought to Saint Elizabeths Hospital."

Facts Relating to Point No. 3—The District Court's Instructions to the Jury in the Will Case (Appeal No. 13,202) When the Jury Returned to Open Court After the Case Had Been Submitted to Them and During Their Deliberations.

The will case was submitted to the jury at 2:45 o'clock p.m. on November 1, 1955. At 5:30 p.m. on the same day, the District Court had the jury brought into open court to ask whether "you are likely to reach a verdict very shortly, or not?" The foreman replied that "it looks like we will not reach a verdict very shortly." Whereupon, the Court asked whether the jury had reached a verdict as to any one of the three issues submitted to them, and when the foreman informed the Court that the jury had reached a verdict on the issue of mental capacity but not on the other two issues; namely, the issues of undue influence and revocation, the court took the verdict on the issue of mental capacity. The verdict was that the testatrix was of sound and disposing mind and capable of executing a valid deed or contract on February 2, 1954. (App. 36-37)

The jury was directed to resume deliberations at 10 o'clock a.m. on November 2, 1955, and at 12:10 o'clock p.m. on that date, the jury was brought into open court again, as a result of a note from the foreman that the jury had not reached agreement on the issues of undue influence and revocation and requested that the court "reinstruct the jury" on those issues. Thereupon, the Court reinstructed the jury on those issues and said: "Does any member of the jury desire to ask anything further?" Thereupon, a colloquy occurred between the Court and Juror No. 8 which tended to show that that Juror did not believe Appellee Hodson because she had

sworn under oath and signed a paper "stating that Mrs. Geare had no money to pay for hospital care. And, as I understand it, that wasn't right." (App. 37-39)

The jury resumed its deliberations at 12:25 o'clock p.m. on November 2, 1955, and at 2:55 o'clock p. m. on the same date, the jury sent a note from its foreman to the Court reading as follows:

> "We the jury have not reached an agreement on Issues No. 2 and 3. We do not appear to be close to reaching an agreement. This appears to be a hung jury. All members affirm their decisions."

Thereupon, the District Court said:

> "Well, I am quite sure this is not a hung jury. I am not going to accept this statement, ladies and gentlemen of the jury. This trial took about three or four days. It cost the taxpayers a considerable amount of money. In fact, it has taken parts of five days, and the case should be decided.
>
> "....."

The Court then proceeded to instruct the jury concerning their duty and responsibility during the course of their deliberations and concluded with the statement 'and I see no reason why you should not promptly reach a verdict.'" The jury retired again at 3:00 o'clock p.m. (App. 41)

At 3:45 o'clock p.m. on the same date, the Court recalled the jury to open court and inquired of the foreman concerning what progress the jury was making toward arriving at a verdict and whether they were likely to have a verdict "very shortly?". The foreman replied that "It doesn't appear, Your Honor, that we will have a verdict very shortly." The Court then inquired as to whether the jury had agreed on either of the two remaining issues, and the foreman informed the Court that the jury was not. The Court then announced an intention

to release the jury until 10:00 o'clock the next morning and then stated:

> "I want you all, each one of you, to bear in mind the suggestions that I made to you at three o'clock, when you were back here, namely, that we have spent five days trying this case. That is an expense to the taxpayers. You should reach a decision. Some jury will have to decide this case and you should be that jury, because no other jury will know any more about the case than you do. And I want to repeat, again, that if a large majority is one way or the other—and I don't care which way—then the minority should be humble enough to ask themselves whether they ought not reconsider their views.
>
> "....."

The Court then proceeded to repeat many of the things stated to the jury when it announced at 2:55 o'clock p.m. on the same date that it appeared to be a hung jury and that all members of the jury affirmed their decisions. (App. 42-43)

The jury resumed its deliberations at 10:00 o'clock a.m. on November 3, 1955. The jury was brought back in open court at 2:45 o'clock p.m. on that date, as the result of a note from its foreman, reading as follows:

> "We, the jurors, request that we be reinstructed regarding our responsibilities to get together on a unanimous verdict."

Thereupon, the Court again repeated briefly the instructions given on two prior occasions. Among other things, the Court added a statement that "All available evidence that is admissible under the rules of law have been brought before you. And a decision has to be reached by a jury, and you are that jury." At the close of the Court's further instructions, the following occurred:

"Now, is there anything else that any member of the jury would like to ask the Court?

"The Foreman: 'Your Honor——'

"The Court: 'Mr. Foreman?'

"The Foreman: 'I don't have a question of my own, but I think one member of our panel would like to ask a question.'

"(One of the lady jurors indicated that she did not wish to ask a question.)

"The Foreman: 'I am sorry, Sir. I was mistaken.'

"The Court: 'I hope you will reach a verdict. This case took about five days to try. You have all the evidence. You have been out for a long time. I think you ought to reach a verdict promptly. I hope you will do so.'"

Thereupon, counsel for appellants requested the Court to instruct the jury that no individual juror need give up his own convictions, and the Court said: "I deny the request." (App. 45-46)

Thereupon, the Court said to the jury: "You may retire to the jury room and I hope you will have a verdict very promptly." The jury retired to the jury room at 2:55 o'clock p.m., and in three minutes returned to the court room at 2:58 o'clock p.m., and the foreman announced that the jury had reached a verdict on the issues of undue influence and revocation. The verdict on both issues was in favor of the appellees. (App. 46-47)

STATUTES AND RULES INVOLVED

United States Code Annotated, Title 28, Section 1732, formerly Title 28, Section 695:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such

business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

District of Columbia Code, 1951 Edition, Section 21-311:

"Upon the filing with the court of a verified petition as hereinabove provided, accompanied by the affidavits of two or more responsible residents of the District of Columbia setting forth that they believe the person therein named to be insane or of unsound mind, the length of time they have known such person, that they believe such person to be incapable of managing his own affairs, * * * the court, or any judge thereof in vacation, may, in its or his discretion, issue an attachment for the immediate apprehension and detention, for preliminary examination, of such person in Saint Elizabeths Hospital * * *."

Federal Rules of Civil Procedure:

Rule 75 (d)

"(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948."

Rule 75 (e)

"(e) Record To Be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all

exhibits and more than one copy of any documents shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties."

STATEMENT OF POINTS

1. The Court erred in excluding from the evidence the affidavits of Neil P. Campbell, M. D., and Roger S. Cohen, M. D., filed in Mental Health No. 600-54 in this court (Plaintiffs' Exhibit 1).

2. The Court erred in excluding from the evidence the records of St. Elizabeths Hospital (Plaintiffs' Exhibit 14).

3. The Court erred in its instructions to the jury when the jury returned to open court after the case had been submitted to them and during their deliberations.*

SUMMARY OF ARGUMENT

1. It is settled law in this jurisdiction that the doctors' affidavits procured and filed by the Appellee Hodson with and as a part of her verified lunacy petition against Mrs. Geare were admissible as admissions by reference and/or adoption. *General Finance, Inc.* v. *Stratford*, 71 U. S. App. D.C. 343, 109 F. 2d 843; *New York Life Insurance Co.* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297.

The fact that the doctors could not be cross-examined did not make the affidavits inadmissible. *Milton* v. *U. S.*, 71 U. S. App. D.C. 394, 110 F 2d 556; 398; *General Finance, Inc.* v. *Stratford*, supra.

* Point No. 3 relates only to appeal No. 13,202.

The doctors' affidavits were relevant on the issues of mental capacity, fraud and deceit, undue influence, duress and coercion of the Appellee Hodson. They showed that Mrs. Geare was of weak and unsound mind and a person who could have been easily influenced. The facts that the affidavits were procured and filed by the Appellee Hodson in a lunacy proceeding filed by her against Mrs. Geare shortly after she had acquired title to Mrs. Geare's property and the principal item of her income, and a will in her favor, tended to show that Mrs. Geare was under the domination and control of the Appellee Hodson and tended to prove the allegations of fraud and deceit, undue influence, duress and coercion against her.

2. The factual statement of Mrs. Geare's illness, given by Appellee Hodson to the hospital doctor at Saint Elizabeths Hospital soon after Mrs. Geare's admission to that hospital was admissible in evidence under the Federal Shopbook Rule.

Said hospital record was made on the official hospital form by a hospital doctor for use by the hospital in determining the nature of the patient's mental illness, and is clearly admissible under the rule laid down by the Supreme Court in *Palmer v. Hoffman*, 318 U. S. 109, that a record made in the regular course of business and relating to and connected with the business is admissible under the Federal Shopbook Rule.

The hospital record is factual, and contains no matters of opinion such as would render it inadmissible under *New York Life Insurance Company v. Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297.

The case of *Clainos v. United States*, 82 U.S. App. D.C. 278, 163 F. 2d 593, does not support the trial court's exclusion of the hospital record in question. This factual statement was not made extraneously, and later placed in the records, as was true in the Clainos case; but was

made by the hospital doctor at the hospital and immediately became a part of the hospital records.

The hospital record was relevant and material to the issues of mental capacity, and undue influence, duress and coercion exerted by Appellee Hodson over the testatrix; it also contains admissions inconsistent with Appellee Hodson's present position, and bears upon her credibility as a witness. The exclusion of this hospital record was highly prejudicial to Appellants' case and was reversible error.

3. The supplemental instructions given to the jury were coercive and were not of the kind generally employed and approved. *Allis* v. *United States*, 15 Sup.Ct. 36, 155 U.S. 117, 39 L. Ed. 91; *Allen* v. *United States*, 17 Sup. Ct. 154, 164 U. S. 492, 41 L.Ed. 528; *Commonwealth* v. *Tuey*, (Mass.), 8 Cush. 1; *State* v. *Smith*, 49 Conn. 376.

The type of instruction employed in this case has been condemned in similar circumstances; *St. Louis & S. F. R. Co.* v. *Bishard*, 147 F. 496; *Stewart* v. *United States*, 300 F. 769; *Chicago & E. I. Ry. Co.* v. *Sellars*, 5 F. 2d 31; *Berger* v. *United States*, 62 F. 2d 438; but has been approved where it is properly safeguarded by language which instructs the jury concerning the sanctity of their conscientious convictions; *Hill* v. *Wabash Ry. Co.*, 1 F. 2d 626; *Hoagland* v. *Chestnut Farms Dairy, Inc.*, 63 App. D.C. 357, 72 F. 2d 729.

The trial court erred in instructing the jury as it did, after the jury had indicated that it was a "hung" jury, and in telling the jury that a decision has to be reached by a jury "* * * and you are that jury," and in refusing the request of counsel for appellants to instruct the jury that no individual juror need give up his own convictions

ARGUMENT

Point No. 1. The District Court Erred in Excluding from the Evidence the Affidavits of Drs. Campbell and Cohen Filed by Appellee Hodson in Mental Health Case No. 600-54 (Plaintiffs' Exhibit No. 1).

It is settled law in this jurisdiction that where one person refers another to a third party for information in reference to an uncertain or disputed matter, the person making the reference is bound by the statements of the party to whom he has referred another, the same as though the statements were made by himself. This point was settled by this court in *General Finance, Inc.* v. *Stratford*, 71 U.S. App. D.C. 343, 109 F. 2d 843. In that case, General Finance, Inc., through its president, referred another to its bookkeeper for certain information. A witness to the bookkeeper's statements testified concerning the bookkeeper's statements. The bookkeeper's name was Hausenblaus. This court said, p. 343-344:

> "(1-3) Appellant objected to this testimony, and contends that the statements of Hausenblaus should have been excluded as hearsay. We think they were properly admitted against appellant, as admissions which appellant had authorized Hausenblaus to make in its behalf. 'Where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is bound by the declarations of the party to whom he was referred, as if they were made by himself'; i. e., they are admissible in evidence against him. Allen v. Killinger, 8 Wall. 480, 486, 487, 19 L.Ed. 470. 'The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact.' Chapman v. Twitchell, 37 Me. 59, 62, 58 Am. Dec. 773. Drake v. Holbrook, 78 S.W. 158, 25 Ky. Law Rep. 1489, was an action for deceit in the sale of corporate stock. The trial court prevented plaintiff from testifying to statements about the corporation's affairs which the corporation's bookkeeper had made to plaintiff. It was held

that this evidence should have been admitted, because defendant had told the bookkeeper to show the books to plaintiff and tell plaintiff everything he wanted to know about them. In Skidmore v. Johnson, 70 N.J.L. 674, 57 A. 450, plaintiff had written a letter to defendant asking for payment of an alleged debt, and defendant had directed her daughter to write a reply, without telling her what to write or being told what she wrote. This letter was held admissible against the defendant. In Chadsey v. Greene, 24 Conn. 562, 571, defendant, in negotiating a sale to plaintiff, referred plaintiff to a neighbor for information regarding defendant's character and responsibility. What the neighbor said to plaintiff was received in evidence. Cf. Wigmore, Evidence, 2 Ed., §§ 1069, 1070. Hausenblaus was a witness at the trial, and appellant could have examined him on his admissions if it had cared to do so. Moreover, the effect of the doctrine of admissions is to dispense with the requirement of cross-examination. A party has no need to cross-examine himself, and he seldom has need to cross-examine those whom he has authorized to speak for him. Usually, as in this case, he can do so if he chooses.

"We need not decide whether the statements of Hausenblaus would have been admissible, because he was appellant's agent, even if he had not been detailed by appellant's president to go over the books with appellee's counsel."

New York Life Insurance Co. v. *Taylor*, 79 U.S. App. D.C. 66, 147 Fed. (2nd) 297, involved an action on a life insurance policy to recover double indemnity on the ground of accidental death. This court said, p. 68:

"The first error claimed is that the trial court excluded the statement of a physician which was part of the proofs of death required to be furnished by the beneficiary. . . . . .

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[1] Cf. *Pan-American Petroleum & Transport Company* v. *United States*, 273 U.S. 456, 499, 47 S. Ct. 416, 71 L.Ed. 734; *Takahashi* v. *Hecht Company*, 60 App. D.C. 176, 178, 50 F.2d 326; Wigmore, Evidence, 2 Ed., § 1078.

"....."

"(1-2) * * * Ordinarily a statement by a physician submitted by the beneficiary of a policy as part of the proofs of death is admissible to show the manner of death.[2] Its admissibility is based on the fact that the beneficiary whose duty it is to furnish the proofs of death must be presumed to have authorized the statements made in those proofs. If later at the trial she takes a position inconsistent with the proofs of death which she has submitted those statements are admissible as her representations. As the Supreme Court said in the case of Mutual Life Ins. Co. of Newark, N. J. v. Newton,[3]:

"'* * * the proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained.'

"(3-5) It is apparent from the above opinion that proofs of death are competent evidence of the cause of death only where the relevant statements contained therein are authorized by the beneficiary.[4] The fact that the beneficiary submitted the proofs to the

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[2] *Wetmore* v. *Travelers' Protective Ass'n.*, 10 Cir., 1933, 64 F.2d 435.

[3] 1875, 22 Wall. 32, 35, 22 L.Ed. 793.

[4] 'Where the beneficiary in an insurance policy files as a part of the proofs of death such a certificate as this, under the circumstances of this case it amounts to an approval by him of the statements in it as correct and should be received in evidence against him as an admission by adoption. 2 Wigmore, Evidence, 2d Ed., § 1073, p. 570.' *Russo* v. *Metropolitan Life Ins. Co.*, 1939, 125 Conn. 132, 3 A.2d 844, 846.

insurance company creates a presumption that the statements were authorized. * * *."

Even lack of opportunity to cross-examine the doctors would not have rendered their affidavits inadmissible. Their affidavits were procured and filed by the Appellee Hodson and constituted a part of her verified petition in the lunacy proceeding of Dorothy Smallwood Geare. In *Milton* v. *United States*, 71 U.S. App. D.C. 394, 110 Fed. (2nd) 556, this court said, p. 398:

> "(7-10) When evidence is offered to prove an admission—unlike the situation when it is offered as secondary evidence to prove statements of dead or absent witnesses[12]—there is no requirement that opportunity should have been given for cross-examination[13] and, consequently, no requirement of identity of issues.[14] Admissions have probative value not because they have been subjected to cross-examination and therefore satisfy the hearsay rule, but because they are statements by a party opponent, inconsistent with his present position as expressed in his pleadings and testimony.[15] It is not even necessary that such evidence should have been given in a courtroom or under oath.[16] The fact, that it was so given in the present case, however, does not detract from its admissibility.[17] * * *."

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[12] See 3 Wigmore, Evidence (2d Ed. 1923) §§ 1386, 1387.

[13] 2 Wigmore, Evidence (2d Ed. 1923) § 1048. See *General Finance Inc.* v. *Stratford*, (No. 7346, decided January 29, 1940) 71 App. D.C. 343, 109 F.2d 843.

[14] 3 Wigmore, Evidence (2d Ed. 1923) § 1387(3); *State* v. *Longstreth*, 19 N.D. 268, 276, 121 N.W. 1114, 1117, Ann. Cas. 1912D, 1317; *People* v. *Butler*, 111 Mich. 483, 69 N.W. 734; *State* v. *Willis*, 71 Conn. 293, 41 A. 820; 2 Bishop's New Criminal Procedure (2d Ed. 1913) § 1255.

[15] 2 Wigmore, Evidence (2d Ed. 1923) §§ 1048 (3), 1049, 1050.

[16] See *Miles* v. *United States*, 103 U.S. 304, 308, 311, 26 L.Ed. 481; *Sinclair* v. *District of Columbia*, 20 App. D.C. 336, 338, 339, appeal dismissed, 192 U.S. 16, 24 S. Ct. 212, 48 L.Ed. 322; *O'Neill* v. *United States*, 8 Cir., 19 F. 2d 322, 325; *Müller* v. *United States*, 7 Cir., 53 F.2d 316. See also, *Wilson* v. *United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L.Ed. 1090.

[17] *Henderson* v. *State*, 95 Ga. 326, 329, 22 S.E. 537, 538; *Macomber* v. *Bigelow*, 126 Cal. 9, 16, 58 P. 312, 315; *State* v. *Hopkins*, 13 Wash. 5, 42 P. 627; *Rafferty* v. *State*, 91 Tenn. 655, 665, 666, 16 S.W. 728, 730.

Obviously, the doctors' affidavits were relevant on the issues of mental capacity, fraud and deceit, and undue influence, duress and coercion. They showed that Dorothy Smallwood Geare was of unsound mind. They also showed that she, being of weak and unsound mind, was a person susceptible to fraud and deceit and undue influence. The facts that the Appellee Hodson filed a petition to have Mrs. Geare adjudged to be a person of unsound mind and accompanied her petition with affidavits of doctors who had examined and observed Mrs. Geare, including her attending physician for a period of more than a year, tend to show that Mrs. Geare was under the domination and control of the Appellee Hodson and susceptible to duress and coercion. Those facts also tend to show that confidential relations existed between Mrs. Geare and Appellee Hodson.

It follows that because of the erroneous exclusion of the doctors' affidavits, the appellants are entitled to a new trial on the issues of (1) mental capacity, (2) fraud and deceit, and (3) undue influence, duress and coercion.

Point No. 2. The District Court Erred in Excluding from the Evidence the Records of Saint Elizabeths Hospital (Plaintiffs' Exhibit 14).

Mrs. Geare was admitted to Saint Elizabeths Hospital on April 30, 1954, on the petition for a Writ De Lunatico Inquirendo filed by Appellee Hodson. The factual statement was taken by the hospital doctor from Appellee Hodson on May 6, 1954 (App. 32-33).

The Court will notice that the statement was made on an official hospital form designated "Clinical Record" and "Report on Information," by a member of the hospital staff, at the hospital, soon after the admission of Mrs. Geare. It is the customary factual statement usually taken from a friend or relative upon the admission of any patient in the regular course of the business of a hospital, for use

by the hospital in determining the nature of the patient's illness.

The trial court excluded this factual statement from the evidence, citing in support of its action, *New York Life Insurance Company* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F.2d 297 and *Clainos* v. *United States*, 82 U.S. App. D.C. 278, 163 F.(2d) 593. We have assigned this action of the trial court as error, and contend that these cases do not support the court's action. This factual statement is clearly admissible under the Federal Shopbook Rule, (U.S.C.A., Title 28, Sec. 1732). See "Statutes Involved," supra.

The purpose of this statute was to change the old common law rule requiring the person who made the entries to be produced as a witness to identify them, so that records could be admitted in evidence, irrespective of the death or unavailability of the person making them.

In *Palmer* v. *Hoffman* (N.Y. 1943), 318 U.S. 109, 87 L. Ed. 645, rehearing denied 318 U.S. 800, 87 L. Ed. 1163, the Supreme Court held that an accident report of a railroad engineer giving his version of an accident to a railroad official was not admissible in evidence, because the report was not connected with the business of running the railroad. In construing the above statute the Court said (318 U. S. 115):

> "The several hundred years of history behind the Act (Wigmore, supra, §§1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

In that case the Court simply held that to come under the Shopbook Rule the statement must not only be made

in the regular course of business, but it must also be connected with the conduct of the business.

New York Life Insurance Company v. *Taylor* (1944), 79 U.S. App. D.C. 66, 147 F. 2d 297 does not contain authority for the exclusion of the factual statement in question. In that case it was sought to have introduced in evidence hospital records containing the opinions of the hospital doctors—not mere factual matters—who treated the patient while at the hospital, to show suicidal intent. In passing on these records, this Court stated (p. 69):

> "In this case the records are not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc. They are offered to prove the truth of accounts of events and of complicated medical and psychiatric diagnosis. The accuracy of such accounts is affected by bias, judgment, and memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like.' The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation.' *Palmer* v. *Hoffman*, supra, p. 114."

This Court simply held that the opinions of the hospital doctors, their diagnoses, etc., upon which competent men would differ, and which would "depend on opinion or conjecture;" would not be admissible. However, the Court clearly stated that hospital records of the following nature would be properly admissible (p. 72):

> "The records offered here are not the kind of entries which are admissible under the established principles of the Shop Book exception to the hearsay rule. Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic re-

flection of observations. This obviously excludes those which depend on opinion or conjecture. The internal check on the reliability of admissible records comes from two sources: (1) an efficient clerical system, and (2) the fact that they are the kind of observations on which competent men would not differ. * * *"

"Hospital records are no different from any other kind of records kept in the regular course of business. They must be subjected to the same tests as to subject matter. Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible. An observation that there was a deviation of the nasal septum is admissible. Likewise, an observation that the patient was well under the influence of alcohol. * * *"

See *Ulm* v. *Moore—McCormack Lines*, CCA (2d Cir.) NY 1940, 115 F. 2d 492, cert. den. 313 U.S. 567, 85 L. Ed. 1525; *Reed* v. *Order of United Commercial Travelers of America*, (2d Cir.) CCA NY 1941, 123 F. 2d 252; *Pollack* v. *Metropolitan Life Insurance Co.*, CCA (3d Cir.) NJ 1943, 138 F. 2d 123; *Tucker* v. *Loew's Theatre & Realty Corp.*, CCA (2d Cir.) NY 1945, 149 F. 2d 677; *Williams* v. *Overholser*, (1945), 80 U.S. App. D.C. 235, 151 F. 2d 457, cert. den. 327 U.S. 808, 90 L. Ed. 1032; *Woodward* v. *United States* (1950) CCA (8th Cir.) Mo. 1950, 185 F. 2d 134, reversed on other grounds, 341 U.S. 112, 95 L. Ed. 670.

It is evident from these decisions that hospital records consisting of *factual matters* relating to the patient's condition, where there could be no question of their trustworthiness or reliability, would be admissible in evidence. The facts recorded by the hospital doctor soon after the admission of Mrs. Geare, were within the knowledge of the informant, Appellee Hodson, who had observed the conduct of the patient from the inception of her mental illness, Mrs. Geare having lived with Appellee Hodson for

13 years. The factual data given by Appellee Hodson to the hospital doctor in the regular course of the hospital's business, clearly related to the business of the hospital and particularly to the business of the hospital in treating this patient. This factual statement meets the test of reliability and imports trustworthiness. As noted on the statement (App. 32-34): "The information appears to be valid. * * * The patient has been living with the informant for the last 13 years."

We believe that this factual statement is clearly admissible under the decision of this Court in the *Taylor* Case. See also the vigorous dissent by Associate Justice Edgerton, who expressed the opinion that all of the hospital records offered in evidence in the *Taylor* Case were properly admissible under the rule established by the Supreme Court in *Palmer* v. *Hoffman*, supra.

The trial court further cited *Clianos* v. *United States* (1947), 163 F. 2d 593, 82 U.S. App. D.C. 278, in refusing to admit this factual statement. In that case a photograph with notations on the back of prior convictions was admitted in evidence. The photograph was not one made by the Police Department in the regular course of its business, but was, later placed in the records of that department. This Court stated with reference to the Shop Book Rule (82 U.S. App. D.C. 280):

> "* * * That Rule is confined to records kept in the course of the business of which the transaction was a part. It does not refer to an external record which might happen to have been kept by a person outside that business. * * * The Rule contemplates that certain events are regularly recorded as 'routine reflections of the day to day operation of a business' so that 'the character' of the records and their earmarks of reliability' import 'trustworthiness.' Thus, the recordation becomes a reliable recitation of the fact. * * *"

The Clianos case merely follows the rule laid down in *Palmer* v. *Hoffman*, supra; and would not be authority for

the exclusion of the factual statement in question, which was made in the regular course of the business of the hospital and connected with the business of the hospital.

In *Ulm* v. *Moore—McCormack Lines*, supra, the Circuit Court of Appeals, Second Circuit, held that records of a Government hospital made at the time of admission of the patient to the hospital and relating to the nature and extent of injuries, and also records of his hospitalization at a prior time, were admissible under the Shopbook Rule, as bearing upon the credibility of plaintiff as a witness, and upon the question whether certain injuries therein claimed had resulted from a fall, or had actually been received at a prior date.

In *Wickman* v. *Bohle* (1938), 173 Md. 694, 196 A. 326, a hospital record, made when a boy who had been struck by an automobile while he was riding a bicycle, returned to the hospital for a second treatment two weeks after the accident, stating that the history of the case was that of "a fractured clavicle two weeks prior to his admission," was held to be admissible under a similar Maryland statute where it was made by an intern of the staff in the course of his regular duties at the hospital.

The factual statement excluded by the trial judge in this case was extremely material and relevant to Appellants' case, for it had a direct bearing particularly upon the issues of (1) the mental capacity of the testatrix, (2) whether Appellee Hodson procured the will of deceased by undue influence, duress, or coercion, and (3) whether a confidential relationship existed between Appellee Hodson and deceased. The statement contains admissions made by Appellee Hodson in her effort to have Mrs. Geare committed to Saint Elizabeths Hospital for mental treatment not long after she had procured from Mrs. Geare the deed and will in dispute, which admissions are wholly inconsistent with her present position; and it bears upon the credibility of Appellee Hodson as a witness. This hospital

record may well have been a deciding factor, when coupled with the other evidence in the record, in the minds of the jury in arriving at a different verdict in the case. The exclusion of this hospital record was clearly prejudicial to Appellants' case.

For the reasons set forth above we submit that the trial court's action in excluding the statement was plainly in error.

Point No. 3. The District Court Erred in its Instructions to the Jury When the Jury Returned to Open Court After the Case Had Been Submitted to Them and During Their Deliberations.

The supplemental instructions given to the jury by the trial court were coercive and tended to force the members of the jury to reach a verdict without a view to the sanctity of their individual, conscientious convictions, and without regard to their duties as jurors under their oaths, and constituted reversible error.

The Supreme Court of the United States apparently first considered supplemental instructions to the jury in the nature of those in question here in the case of *Allis* v. *United States*, 15 Sup. Ct. 36, 155 U.S. 117, 39 L. Ed. 91. The supplemental charge given by Circuit Judge Walter H. Sanborn at the trial of the case is set out in *United States* v *Allis*, 73 F. 163, at page 182. The charge was impressed upon the minds of the jurors on only one occasion, after the jury had deliberated for twenty-four hours. The charge included the following language:

> "The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a

proper regard and deference to the opinions of each other."

The charge continued with an explanation of the duties of the jurors in consulting together, in language similar to the language employed in this case by the trial court. The Supreme Court approved of the action of the trial court in recalling the jury after they had been in deliberation and assisting them in the solution of any difficulties, without making reference to any of the wording contained in the instructions. In fact, such comment was unnecessary, because the instruction was sufficiently guarded by the language quoted above.

A similar supplemental instruction came to the attention of the Supreme Court in the celebrated case of *Allen* v. *United States*, 17 Sup. Ct. 154, 164 U.S. 492, 41 L. Ed. 528. The charge itself, as given by the trial court, is not reported, but has nevertheless become a legend. In the opinion, written by Mr. Justice Brown, the supplementary instructions were paraphrased; and it is stated in the opinion that the instructions were taken literally from a charge in a criminal case which had been approved by the Supreme Court of Massachusetts in *Commonwealth* v. *Tuey*, 8 Cush. 1, and by the Supreme Court of Connecticut in *State* v. *Smith*, 49 Conn. 376. In *Commonwealth* v. *Tuey*, supra, the court employed the exact language quoted above from the *Allis* case. It appears from the opinion in *Commonwealth* v. *Tuey*, supra, that the supplementary instruction was given only once. *In State* v. *Smith*, supra, the charge given by the trial court is not reported, but the court expressly stated that the charge to the jury was substantially the same as that stated to the jury in *Commonwealth* v. *Tuey;* and it does not appear that the instruction was given more than once.

The present case is not one wherein the jury were instructed only once in the manner questioned. Here the

jury were repeatedly impressed with the supplemental instruction (App. 40-45).

In 1906, in *St. Louis & S. F. R. Co.* v. *Bishard*, 147 F. 496, the Circuit Court of Appeals of the Eighth Circuit ruled that a supplementary instruction somewhat similar to the so-called "Allen" charge was erroneously given, after reviewing *United States* v. *Allis*, supra and *Allen* v. *United States*, supra. One of the three judges deciding the case on appeal was the same circuit judge, Walter H. Sanborn, who had given the properly guarded charge to the jury in the trial of *United States* v. *Allis*, supra. In that case, it appears that the supplementary charge to the jury was given only once, but it did not include the language previously quoted from *United States* v. *Allis*, supra, and *Commonwealth* v. *Tuey*, supra, relating to the conscientious convictions of the jurors. After reviewing the *Allis* case, the *Allen* case, and *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482, the court held that the supplementary charge to the jury was not sufficiently guarded, and that its "* * * tendency was to bring the one juror to an agreement with the others even against the dictates of his own judgment." Whereupon, the judgment was reversed, and the cause remanded for a new trial.

In 1924, the same circuit judge, Walter H. Sanborn, delivered the opinion of the Circuit Court of Appeals of the Eighth Circuit, in *Stewart* v. *United States*, 300 F. 769, holding that the supplemental instruction given was error, in that it had too strong a tendency toward coercion of the minority of the jury. In that case, the supplemental charge included the reading of an excerpt from the opinion of the Supreme Court in *Allen* v. *United States*, supra. Circuit Judge Sanborn, at page 785 of the opinion, referring to the *Allen* case, stated:

> "The excerpt from that opinion was not any part of the charge to the jury in that case, nor did the Supreme Court recommend that excerpt as a fit charge

to the jury under such circumstances as existed in that case or in this."

He then referred to the supplemental charge given to the jury in *United States* v. *Allis*, supra, and its approval in the *Bishard* case, supra, stating that, "If the court below had given that charge, it would have avoided the question now under consideration." The opinion then quotes the paragraph from the opinion in the Allen case, which was read to the jury, and stated:

> "This paragraph of the opinion in Allen's Case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and approved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself."

Judge Sanborn's opinion concerning this part of the appeal in *Stewart* v. *United States* concludes with a statement that "* * * the supplemental charge and especially the excerpt from the opinion in Allen's Case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case."

In the present case this Court is presented with a situation very nearly the same as that in the *Stewart* case, supra. Here there is no evidence of any juror or jurors stubbornly refusing to engage in the proper deliberative functions and

efforts of the jury. Another similarity lies in the fact that in the present case the trial court did not employ an approved supplemental instruction as such; but rather, it used the most coercive and humbling segments of an approved charge repeatedly (App. 40-45), and with emphasis, without referring even once to the language which guarded the instruction in the *Allis* case, supra. The trial court further denied the specific request of appellants' counsel to include this guarding language in the final supplementary instruction. (App. 46)

In *Hill* v. *Wabash Ry. Co.*, 1 F. 2d 626, the Circuit Court of Appeals of the Eighth Circuit was again confronted with the question of a supplemental instruction to the jury; but this time in a civil case. Here the instruction was held to be not erroneous, inasmuch as it was essentially the same instruction as was given by Judge Sanborn in the *Allis* case, supra. The Court went on to say:

> "The court has no right to coerce a jury into a verdict, or to attempt to do so. The important thing in a case is not the mere agreement of the jury, but the correct determination of the issue involved. All parties to the controversy are entitled to the uncoerced judgment of the jurymen, and the test of such an instruction as herein complained of is whether it is in fact an attempt to assist the jury or to coerce them. If it is an attempt to break down the individual judgment and honest conviction of a juryman in order merely to reach a verdict, it is erroneous; * * * Courts should be careful not to infringe upon the jury's prerogatives as triers of fact questions, and not attempt to induce jurors to give up their individual judgment on a fact question by creating the impression that such is the desire of the court."

In *Chicago & E. I. Ry. Co.* v. *Sellars*, 5 F. 2d 31, the Circuit Court of Appeals of the Eighth Circuit again condemned the use of the excerpt from the Supreme Court opinion in the *Allen* case, supra, holding that it was reversible error to include this extract in the supplementary

charge. The court took particular note of its decision in *Hill* v. *Wabash Ry. Co.*, supra, and stated that the rule laid down in the latter case also condemned the instruction under consideration there.

In *Berger* v. *United States*, 62 F. 2d 438, the Circuit Court of Appeals of the Tenth Circuit condemned the use of a supplementary instruction to the jury because, among other things, it failed to state that it is the duty of each juror to perform his duty honestly and conscientiously according to the law and evidence and not to surrender his consientious convictions. The court there stated, at page 440: "An approved charge, so safeguarded, may be found in *United States* v. *Allis*, (C. C. Kan.) 73 F. 165."

In *Hoagland* v. *Chestnut Farms Dairy, Inc.*, 63 App. D.C. 357, 72 F. 2d 79, it appeared that the so-called "Allen charge," taken from language of the opinion of the Supreme Court, was given to the jury only once, and that the court specifically cautioned the jury at the same time by saying, "None of you should return a verdict against your conscientious views". In that case, this court held that there was no error in the procedure of giving this supplementary charge to the jury.

It is manifestly true that when a trial court is faced with the problem of guiding a jury which has indicated that it is a "hung" jury, a grave duty arises to guard the fundamentals of our jury system with greater care than at any other time. In the trial of this will contest in the District Court, a relatively ascertainable minority was beseeched by the Court, and subjected to extreme psychological pressure by the jury foreman (App. 45, 46), to give up the opinions which were causing that minority to disagree with the majority, after the foreman had announced that the jury appeared to be a "hung" jury (App. 40). Indeed, after this announcement by the jury, *the jury heard six times*, words to the effect that "* * * you must endeavor to reach an agreement." (App. 40, twice; App. 42 once; App.

45, three times); they were told of the length of the trial, that there was considerable cost to the taxpayers, and that the case should be decided, on three occasions (App. 40, 42-43, 46); they heard that they should reach a verdict "promptly," or "very shortly" four times (App. 40, 41, 46, 47); they were told that a jury would have to decide the case, and that they should be that jury twice (App. 40, 42-43); and they were told on one occasion:

"And a decision has to be reached by a jury, *and you are that jury*" (emphasis supplied) (App. 45)

Following this latter statement, the jury retired and returned with a verdict in three minutes.

The cumulative effect of the wording in the instructions referred to was to humble and coerce the minority into the position where individual conscientious convictions were abandoned. In this abandonment, the minority was not guided by a proper charge as it was in *Hoagland* v. *Chestnut Farms Dairy*, supra. On the contrary, the Court refused to so guide the jury.

The total length of time during which the jury deliberated was approximately ten hours and twenty-three minutes. The jury were given the so-called "Allen Charge", on the first occasion, after only six hours and five minutes of deliberation; on the second occasion after only forty-five more minutes of deliberation; and again following three hours and fifteen minutes more. On the third occasion the charge, coupled with the admonition that "you are that jury" to decide the case, took its toll. The three minutes during which the jury were out were barely adequate to allow the minority to exclaim "I give up."

It follows that, because of the erroneous instructions to the jury, the appellants are entitled to a new trial on the issues of (1) revocation, and (2) undue influence, duress and coercion.

CONCLUSION

For the reason that the District Court erred in excluding from evidence the affidavits of Doctor Campbell and Doctor Cohen, the appellants are entitled to a new trial in both cases upon the issues of (1) mental capacity, (2) fraud and deceit, (3) undue influence, duress and coercion, and, in the will case, (4) whether the will in question was the last will and testament of Dorothy Smallwood Geare. For the reason that the District Court erred in excluding from evidence the records of Saint Elizabeths Hospital, the appellants are entitled to a new trial in both cases on all of the issues as stated above. For the reason that the District Court erred in its instructions to the jury after the case was submitted to the jury and during their deliberations, the appellants are entitled to a new trial in the will case on the issues of (1) undue influence, duress and coercion, (2) revocation, and (3) whether the will in question was the last will and testament of Dorothy Smallwood Geare.

Respectfully submitted,

ARTHUR J. HILLAND
PAUL M. NIEBELL
THOMAS N. KINDNESS
Attorneys for Appellants